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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1291

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3–A11) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. A17–A133) are reported at 178 NLRB No. 8.

JURISDICTION

The Company's petitions for rehearing and rehearing *en banc* were denied on December 28, 1970, and the judgment of the court of appeals was entered on the same date (Pet. App. A12–A15, A16). The peti-

tion for a writ of certiorari was filed on February 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer engaged in bargaining negotiations with a fixed determination to avoid reaching an agreement with the union, and thereby violated Section 8(a)(5) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at Pet. App. A1–A2.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND: THE COMPANY'S OPPOSITION TO THE UNION

Kellwood Company operates more than 30 seperate plants throughout the United States. Kellwood's Ottenheimer Division, which manufacturers women's apparel, consists of three plants and a distribution center in Little Rock, Arkansas, employing approximately 1,250 employees, and a plant in Lonoke, Arkansas, about 25 miles from Little Rock, which employs approximately 325 employees. (Pet. App. A21.)

In mid-August 1965, the International Ladies' Garment Workers' Union, AFL–CIO (the "Union") began a drive to organize the employees at the Ottenheimer Division's Little Rock plants (Pet. App. A22).

Kellwood countered with a massive anti-union campaign, which the Board found to be highly coercive and violative of Section 8(a)(1) of the Act (Pet. App. A10, A25–A37, A91–A93). As the Trial Examiner, whose findings were adopted by the Board, stated: "Respondent, in all of this, was seeking to show the employees the utter futility of their joining, supporting, and voting for the Union; was seeking to convince the employees that Respondent did not want the Union and had no intent to sign a contract with the Union; that the Respondent would not agree to the Union's demands and that a strike was inevitable, and that an inevitable result of such strike would be the loss of their jobs by the employees" (Pet. App. A37).

Notwithstanding this anti-union effort, the Union won a representation election conducted by the Board on January 12, 1966, by a vote of 666–564. On March 3, 1966, after the Company's election objections were overruled, the Union was certified as bargaining agent for all production, maintenance, and shipping employees in the Ottenheimer Division's Little Rock operations. (Pet. App. A25.)

2. NEGOTIATIONS: MARCH 23–JULY 19, 1966

Collective bargaining negotiations between the Union and the Company began on March 23. During the ensuing four months there were about 20 meetings between the parties (Pet. App. A43–A44). Although both sides knew the economic issues were the crucial ones, the Company insisted on discussing non-

economic subjects first, and accordingly the parties did so "almost to the point of exhaustion" (Pet. App. A45).

In early April, the Union presented a proposal that the Company raise its minimum wage from $1.25 per hour, the then legally mandated minimum, to $1.50 per hour (Pet. App. A44–A45; Pet. 5, n. 2). Not until the last week in June, over two months later, did the Company come forward with a counterproposal on this critical matter (Pet. App. A48). It offered an immediate 5-cent increase above the current federal minimum wage, and then additional increases to keep up with the anticipated increases in the federal minimum (Pet. App. A48–A49, A60).[1]

About a week prior to a bargaining session scheduled for July 18, Kellwood's division heads assembled for a meeting called by Kellwood President Wenzel. At this meeting it was decided to announce on July 18 a 10-cent hourly increase in wages, effective August 1, at all Kellwood plants except the plants in Little Rock represented by the Union (Pet. App. A51–A52). As to the latter, Wenzel and Guthunz, who headed the Ottenheimer Division, determined that the Company

[1] The new law, which was enacted the following September, raised the federal minimum to $1.40 per hour as of February 1, 1967, and to $1.60 per hour as of February 1, 1968 (Pet. App. A60). As petitioner describes its proposal (Pet. 5, n. 2), the Company's minimum would have gone to $1.30 as of the effective date of the contract, to $1.40 on February 1, 1967, to $1.45 on August 1, 1967, to $1.60 on February 1, 1968, and to $1.65 on August 16, 1968. Thus, for two six-month periods during the three-year contract term, the Company's minimum would not have been above the federal minimum.

would make the same 10-cent offer to the Union in the July 18 Little Rock negotiations (Pet. App. A52). Company officials later acknowledged "that one of the reasons for granting the raise was to demonstrate to the employees that they could get a raise or benefits without a union" (Pet. App. A53). Moreover, as the Trial Examiner found, "one of the reasons Respondent timed the announcement for July 18 instead of, say July 19, was to maximize its adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations" (Pet. App. A53).

On July 18, as planned, the Company announced the 10-cent increase at its plants throughout the country. At the Lonoke plant, which was part of the Ottenheimer Division and located only 25 miles from Little Rock (*supra*, p. 2), a Company official emphasized to the employees:

> You did not have to pay one cent in union dues to get this increase. It was not necessary for you to call on any union outsiders to speak in your behalf in order to get this raise.
>
> * * * This increase should be proof that a union is not needed by a company like ours that treats its employees fairly and rewards them for their good work. [Pet. App. A49–A50.] [3]

[3] Petitioner asserts that "the Company-wide wage increase granted at that plant [Lonoke], although a point stressed by both the Board and the court below * * * is one which has already been held *not* to be a violation of the Act by two Courts of Appeal. *Kellwood Co., Ottenheimer Bros. Mfg. Div.* v. *N.L.R.B.*, 411 F. 2d 493 (C.A. 8); *Southern Foundation* v. *N.L.R.B.*, 406 F. 2d 1063 (C.A. 6)." (Pet. 12, n. 9.) In the former, the Eighth Circuit agreed with the Board that the Company

At the July 18 Little Rock meeting, Company representatives discussed other topics for 20 minutes before informing the Union of the decision to put into effect a 10-cent increase in all plants as of August 1 and to offer the same increase to the Union (Pet. App. A50–A51). Shortly thereafter, the Union negotiators received a telephone call from a Union representative, advising of the Company's announcement at Lonoke (Pet. App. A51). The Union negotiators thereupon accused the Company of bad faith bargaining, and the session ended on "this very unfriendly note" (Pet. App. A51).

3. NEGOTIATIONS: AUGUST 18–OCTOBER 24, 1966

On August 18, the Union's chief negotiator, Siems, telephoned a Company official to make a new wage proposal, which included an initial increase of 20 cents per hour (Pet. App. A58). At a meeting on August 29, Siems lowered his proposal to a non-retroactive first increase of 15 cents. The Company held firm to its offer of 10 cents, and indicated that it wanted to put that increase into effect on September 30, retroactive to August 1. The Union refused. (Pet. App. A58–A59.) The parties agreed, however, to a "summit" meeting between Kellwood President Wenzel and Union President Stulberg, neither of whom had previ-

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violated Section 8(a)(1) of the Act based on "the timing, the content and the manner of the [Lonoke] wage increase announcement * * *." 411 F. 2d at 497. The Sixth Circuit case involved not the Lonoke plant but the Company's Alamo, Tennessee plant, and factual distinctions existed between the two cases. *Ibid.*

ously sat in on the negotiations, to be held on September 22 at the Company's offices in St. Louis (Pet. App. A59).

On September 22, the parties went through the list of unresolved issues and succeeded in removing several of them as obstacles to reaching an agreement (Pet. App. A59–A60). Serious disagreement continued on the number of holidays and vacations, the timing for introduction of health and welfare and pension plans, and such economic issues as wage scales and cost of living adjustments (Pet. App. A59–A60). On arbitration of grievances, a major problem, the Company offered a compromise: a "gentleman's agreement" whereby Ottenheimer Division President Guthunz promised to arbitrate matters other than disputes about piece rates whenever requested by Siems, the Union's chief local representative, if Siems would likewise honor Guthunz' requests for arbitration. However, Guthunz refused to put this agreement in writing (Pet. App. A63), and, in a later bargaining session, he cancelled it on the ground that it had been "reached on certain assumptions which * * * no longer have any validity" (Pet. App. A101).

Union President Stulberg made a new Union wage proposal for increases of "10, 10 and 10" (Pet. App. A60). Neither at this meeting, nor afterward, did the Company's negotiators ask Stulberg to spell out the details regarding his proposed 10-cent increments (Pet. App. A61). Stulberg testified that he meant 10 cents above the federal minimum, which would require the Company immediately to boost its minimum

wage by 10 cents to $1.35, then to $1.50 on February 1, 1967, when the federal minimum was scheduled to rise to $1.40, and finally to $1.70 on February 1, 1968, when the federal minimum was scheduled to rise to $1.60 (Pet. App. A60–A61). At the time this proposal was offered both parties had knowledge of these new federal provisions (*id*). Stulberg also asked for a picket line clause—a contractual provision that would allow the Company's employees to respect the picket lines of workers at other Kellwood plants if they engaged in organizational strikes (Pet. App. A62–A63).

On September 29, Stulberg and Wenzel, as well as other members of the negotiating teams, met again, this time at the Union's New York headquarters (Pet. App. A63). A Company representative said that four issues now stood in the way of an agreement: wages, a cost-of-living escalator clause, arbitration of piece rates, and the picket line clause. He said the Company would accept Stulberg's "10, 10 and 10" wage offer if the Union would give way on the other three points (Pet. App. A63). After a Union caucus, Stulberg counterproposed a two-year agreement (his St. Louis offer had been for a three-year pact) without a picket line clause (Pet. App. A63–A64). After a recess during which the Company's negotiators conferred, a Company representative said to Stulberg "you have a contract"—still without asking about the timing of the increases (Pet. App. A64). Stulberg then explained that, in proposing a two-year contract, he intended to follow the same schedule as in his prior

proposal: a 10-cent increase at the outset, 10 cents on top of the new federal minimum wage in February 1967, and another 10 cents on top of the second increase in the legal minimum a year later (Pet. App. A64). The Company negotiators stated that they had thought Stulberg's "10, 10 and 10" three-year offer meant that the increases would be effective at the outset and then on the two succeeding anniversary years of the contract, and that, accordingly, the two-year proposal likewise was tied to the contract anniversary dates, rather than to the effective dates of the federal minimum wage (Pet. App. A61, A64).[3] Thus, under the Company's purported understanding, the last increase would go into effect on the contract expiration date; moreover, under the Company's view the Union was proposing a minimum wage that would be less than the prevailing federal minimum for substantial periods during the contract term (*id*).

The September 29 meeting ended with Kellwood President Wenzel promising to take the Stulberg two-year proposal, as explained that day, to Kellwood's executive committee for instructions, and to let the Union know the Company's position shortly (Pet. App. A65–A66). But, at their hotel after the meeting, Wenzel told his colleagues that he already had sufficient instructions and would not go to his execu-

[3] The Trial Examiner, whose finding was accepted by the Board, concluded that the Company's "alleged misunderstanding of Stulberg's proposal was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process" (Pet. App. A62).

tive committee (Pet. App. A66).[4] The Company negotiators then decided to make the "outside" offer that had been part of their bargaining guidelines since the previous May: a 3-year contract, providing for 5 cents above the federal minimum for two six-month periods and 10 cents above that minimum for the remainder of the term (Pet. App. A66, A68). However, no member of the Company negotiating team suggested immediately presenting this new offer to the Union, although the meeting had just ended and both the Union negotiators and the employee committee members were presumably still available (Pet. App. A66–A67).

On October 6, Guthunz presented the Company's "final offer" to the Union's two chief negotiators. The latter asked a number of questions to test the Company's flexibility, and Guthunz responded that "not legalistically, but realistically, it was the Company's final offer," although the Company was willing to continue to bargain and would consider a 30-month contract (Pet. App. A68–A69). The Union representatives indicated they wished to consult President Stulberg and the full negotiating committee (Pet. App. A69).

On October 10, the Union rejected the Company's offer, stating that it was "not enough" (Pet. App. A69). Chief Union negotiator Siems suggested to Guthunz that the parties go "back to the bargaining table" (Pet. App. A69). A bargaining session was ultimately scheduled for October 24, and, in prepara-

[4] As the Trial Examiner stated, "[i]t thus appears that Wenzel indulged in a deceit with the Union on this matter" (Pet. App. A66).

tion therefor, the Union scheduled a meeting of the employees for the night of October 18 (Pet. App. A70).

On October 18, just prior to the Union's meeting, the Company sent the employees a letter outlining the favorable features of the Company's proposal, which it said had been made to "protect you from any possibility of a strike." The letter further pointed out that the Union had not given employees the details of this proposal, and urged them to "INSIST ON YOUR DEMOCRATIC RIGHT TO VOTE" so that a "minority" would not decide the Union's course on whether to accept the offer (Pet. App. A70–A73). In a postscript, Guthunz, who had signed the letter, said the proposal would be presented again on October 24, and that the Company would make the first wage increase retroactive to August 1 only if the offer were accepted by October 28 (Pet. App. A71–A72). The employees attending the Union meeting unanimously passed a resolution authorizing its negotiating committee to call a strike "because of the unfair labor practices of Ottenheimer Brothers * * *" (Pet. App. A73–A74).

The October 24 bargaining session was marked by bitter exchanges on both sides and ended when the Company's negotiating team walked out (Pet. App. A74–A75). As the Trial Examiner found (Pet. App. A77.):

> At this meeting, Respondent's spokesman [Kullman] conducted himself more as though he was intentionally trying to aggravate the

> situation and force the employees to strike than as though he were trying to move forward to an accord with the Union. Thus, instead of moving forward Kullman went backwards, and, using figures he knew were erroneous, talked about the "agreement" in New York and called the Union's negotiator a liar. Kullman also accused the Union of deceiving employees as to what happened in New York. * * *

On the afternoon of October 24, the Company sent another letter to the employees, which attacked the Union and announced that the Company would increase wages by 10 cents per hour immediately because the Union had "forced this impasse" (Pet. App. A77–A79). The Company did not send a copy of this letter to the Union or otherwise notify it that it was going to put the 10-cent increase into effect (Pet. App. A79).[4] The letter also accused the Union's chief negotiator of denying the true facts about the New York meeting, erroneously claimed that the Union had said in the meeting of October 24 that it had no offer on the table, and urged employees not to be "misled" by a union that wanted to "force" them out on strike "to further *its interests*" (Pet. App. A78–A80).

4. THE COMPANY'S CONDUCT DURING THE STRIKE

The strike began on October 25 and lasted for 13 months, until the Union abandoned it (Pet. App. A80). During this period there were several meetings and various exchanges of correspondence between the

[4] The Board found that this unilateral increase, which was actually instituted on October 25, constituted a separate violation of Section 8(a)(5) and (1) of the Act (Pet. App. A126).

parties, but no progress was made towards resolving the dispute (Pet. App. A98–A114). On the contrary, the Company aggravated the situation. Thus, as the Trial Examiner found, its attitude and conduct at meetings on May 15 and July 21, 1967, evinced "no genuine effort to reconcile its differences with the Union," but instead were "designed to frustrate rather than promote an agreement" (Pet. App. A112–A114). Moreover, the Company committed additional unfair labor practices. On December 21, 1966, it refused to give the Union relevant information—a current list of employees on the payroll—needed for bargaining purposes (Pet. App. A106–A109); on February 1, 1967, it instituted a second unilateral wage increase over the Union's objection (Pet. App. A109–A111); it bargained directly with strikers concerning their return to work during and after the strike (Pet. App. A111, A120); and, on December 5, 1967, it withdrew recognition from the Union (Pet. App. A121).

In reviewing the Company's situation on December 22, 1967, a month after the conclusion of the strike, Ottenheimer Division President Guthunz told the employees, most of whom were replacements hired during the strike, that the Company "did what we set out to do—we did what we promised to do—which is more than I can say for another group" and that the unfair labor practice charges recently filed by the Union represented the "union's last gasp" (Pet. App. A40).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, affirming the Trial Examiner, found, *inter alia*, that "the preponderance of the evidence in the entire record" demonstrates that the Company "never intended to reach a contract with the Union * * * [and] that no good-faith impasse was ever reached" (Pet. App. A88, A17). Accordingly, the Board concluded that the Company "[a]t all times since March 23, 1966 * * * has violated Section 8(a)(5) and (1) of the Act by refusing and failing to bargain in good faith with the Union * * *" (Pet. App. A125). The Board ordered the Company, *inter alia*, to cease and desist from the unfair labor practices found, to bargain with the Union in good faith, and to embody any understanding reached in a signed agreement (Pet. App. A127-A130, A18).[8]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order except in one respect not here pertinent (Pet. App.

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[8] The Board also found that the Company further violated Section 8(a)(1) and (5) of the Act as noted *supra*, pp. 12, n. 5, 13. Moreover, it found that the strike was caused and prolonged by the Company's unfair labor practices, and that the Company thus violated Section 8(a)(3) and (1) by failing and refusing to reinstate the strikers upon the termination of the strike and the Union's unconditional reinstatement application on their behalf (Pet. App. A126). To remedy this violation, the Company was ordered to offer reinstatement to the strikers (discharging if necessary employees hired since the commencement of the strike), and to make each striker whole for any loss of pay he may have suffered because of the discrimination (Pet. App. A129).

A3–A11). The court concluded "[w]e have little difficulty with this record in holding that there exists sufficient evidence to sustain the Board's finding of Section 8(a)(5) bad faith" (Pet. App. A8–A9). The court pointed to the undisputed evidence "that the company in its pre-election campaign and in its later bulletins and speeches emphasized that they could not be forced to agree with the union and that they later boasted they were successful in keeping their promises" (Pet. App. A8–A9). It added: "The company's early shadow bargaining, evidenced by offers which gave no more than the anticipated federal minimum wage increases, cannot be ignored; the unilateral wage increases immediately before and during the strike, their earlier misrepresentation that they would have to confer with Kellwood's Executive Committee before negotiating further, the company's ploy in rehashing old misunderstandings in post-strike meetings, the company's denial of relevant information requested by the union in bargaining, all are among the many many incidents considered by the Board supporting an 8(a)(5) violation" (Pet. App. A9).

ARGUMENT

The basic issue raised by the petition is whether an overall refusal to bargain in good faith may be found despite the employer's desire to reach an agreement, primarily because he has manifested an anti-union attitude and has taken a bargaining stance which may "embarrass" or "denigrate" the union (Pet. 2, 8–9). However, this issue is not presented by this case. The Board found that petitioner engaged in

bargaining with no intent to reach a final agreement with the Union (Pet. App. A84, A89), and that this intention was manifested, not only by its anti-union attitude and the quality of its bargaining proposals, but by such other acts as announcing a 10-cent wage increase at the nearby Lonoke plant before making the same offer to the Union at Little Rock; communicating directly with the employees in October in an effort to undermine the Union's position at the bargaining table; granting unilateral wage increases both immediately before and during the strike; Kellwood President Wenzel's deceit in informing the Union that he had to take Stulberg's last proposal back to the Kellwood executive committee; and the Company's "bad faith misunderstanding" of Stulberg's wage proposals (Pet. App. A82–A90).

The court of appeals had "little difficulty in holding that there exists sufficient evidence to sustain the Board's findings of §8(a)(5) bad faith" (Pet. App. A9). It added: "It is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board. There existed obvious strategy to force a 'collision course' and obstruct bargaining. The company succeeded in what it set out to do." (Pet. App. A11).[1]

[1] Contrary to petitioner's suggestion (Pet. 2, 10), the court below did not disagree with the Board by finding that the Company's misunderstanding of Stulberg's "10-10-10" proposal was in good faith (see Pet. App. A82). The court merely stated: "Assuming, solely for the sake of argument, there existed a good faith misunderstanding in the 'acceptance' of the company, there are too many other factors which weigh against the company's contention of good faith bargaining" (Pet. App. A6).

These factual issues present nothing warranting further review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 420; *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (Mr. Justice Frankfurter concurring).[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

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[1] The cases cited by the Company—*M.R. & R. Trucking Co.* v. *National Labor Relations Board*, 73 LRRM 2705 (C.A. 5) (Pet. App. A134–A138), and *United Steelworkers of America* v. *National Labor Relations Board* (*Florida Machine & Foundry Co.*), 73 LRRM 2790 (C.A. D.C.) (Pet. App. A148–A161)— are factually distinguishable. Cf. *Sweeney & Co.* v. *National Labor Relations Board*, 76 LRRM 2821, 2826 (C.A. 5).